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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

NATHAN DANIEL BELTON,

Defendant and Appellant.

E032729

(Super.Ct.No. HEF002500)

OPINION

In re NATHAN DANIEL BELTON

on Habeas Corpus.

E033937

(Super.Ct.No. HEF002500)

APPEAL from the Superior Court of Riverside County. Rodney L. Walker,
Judge.

Reversed with directions. Petition for writ of habeas corpus granted.

Anita P. Jog, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, David Delgado-Rucci and Elizabeth S. Voorhies, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Nathan Daniel Belton of battery on a police officer. (Pen. Code, § 243, subd. (b).) He was granted probation and appeals, claiming that evidence was erroneously excluded and that his trial attorney was incompetent for failing to bring a *Pitchess*¹ motion below. We reject his first contention. As to the second, which is echoed in his petition for writ of habeas corpus, we determine that due to disagreement between the parties as to why trial counsel failed to bring a *Pitchess* motion, a show cause hearing should be conducted to determine that reason. If the trial court determines it was an informed tactical decision within the range of reasonable competence, it shall reinstate the original judgment and sentence. If the trial court determines it was not, it shall entertain a *Pitchess* motion. If the motion reveals discoverable information that could lead to admissible evidence helpful to Belton's defense of the charge, the trial court shall grant the requested discovery and order a new trial. If the motion does not, the trial court shall reinstate the original judgment and sentence.

FACTS

On July 19, 1999, Belton refused to comply with the demands of the victim, a police officer responding to a disturbance call at a motel room, to come outside the room. The victim pulled Belton out of the room and a scuffle ensued between them and

Belton's friend, the result of which was that the friend was fatally shot by the victim.

The issue at trial was whether the victim acted properly in his interactions with Belton or whether he used excessive force on him, as Belton claimed in his testimony.

ISSUES AND DISCUSSION

1. *Exclusion of Evidence*

Belton contends the trial court abused its discretion in refusing to admit evidence that the victim had previously exaggerated under oath about an unrelated incident. The record before us contains the following information about the victim's prior testimony:

“[Defense counsel:] I have got [the victim's] description [in his deposition of February 23, 2001,] of one of the knockdown, drag-out fights when he was a peace officer using a baton, wherein he indicates that ‘[a]t one point the fight had looked like I was at the losing end. I made it through.’ [¶] And the incident he describes is in Coachella, involving 2- to 300 persons. Officer [*sic*] responded. Officers tried to take a suspect into custody. One of the officers named Officer Waters broke his leg trying to take a suspect in custody. This officer testified that he is a reserve officer, became encircled by a crowd; and that by using punches and strikes with a baton, he was using a baton, that he held other people off, and that he got hit during the course of that, and he did not use or draw his gun during that incident. He did not use his OC spray during that incident. [¶] . . . [¶] . . . That is a specific incident when he was a Coachella police officer involving an arrest where he, Officer Waters and Reserve Officer Luna were

[footnote continued from previous page]

¹ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

present. [¶] . . . I would like to get into that incident because he describes that as an incident when an officer broke his leg and about 2- or 300, quote, ‘a scenario when cowboys,’ unquote, which are supposedly gang members -- the police report of that incident indicates there were seven or eight Mexican Americans in a driveway, and that the police officer did not bust his leg, . . . but did get a bad sprain. . . . There is a big difference between 7- or 800 people in a driveway, and gangsters attacking you. . . . I have a report written by [the victim] about that incident.”

Belton contends that the foregoing offer of proof shows that the victim exaggerated during his deposition. Quite frankly, defense counsel’s offer of proof is so unclear and confusing, it is difficult to tell what the victim said about the incident at the deposition compared with what the police report said about it. Even if the two versions conflict, that does not necessarily mean that the victim exaggerated during the deposition. The report could be incorrect. The offer of proof was simply inadequate to show that, at his deposition, the victim exaggerated the threat to him during this unrelated incident. Therefore, the trial court did not abuse its discretion in excluding it.

Belton also contends that the trial court abused its discretion by prohibiting defense counsel from asking the victim whether he had erroneously arrested people for resisting a police officer. His offer of proof at trial was that in March and April 1996, the victim arrested five people for resisting arrest. Although the district attorney’s office filed on all five, four were eventually dismissed and the fifth resulted in a plea bargain. However, the fact that four were dismissed does not prove that the suspects had been

erroneously arrested in the first place, or, as Belton here asserts, that the victim tended to exaggerate the seriousness of resistance to him put up by his detainees. Finally, the victim testified during cross-examination by defense counsel that he usually did not follow up on cases resulting from his arrests. Therefore, it was doubtful that the victim would have been aware of the four dismissals. Thus, the trial court did not abuse its discretion by excluding the evidence.

Belton also contends that the trial court abused its discretion by prohibiting defense counsel from asking the victim about the number of previous altercations in which the latter had been involved. References to this in the record are factually in conflict. When the prosecutor first broached the subject with the trial court, he represented that in his deposition, the victim admitted to engaging in 200 fights during his teen and adult years, 50 of them while he was a police officer. Defense counsel did not contradict this representation. Much later, when defense counsel asked the victim on cross-examination whether the latter had been involved in physical altercations with over 200 suspects as a peace officer, the prosecutor successfully objected to the question on the basis, *inter alia*, that it misstated the evidence. However, when defense counsel made his offer of proof, he represented that the victim had previously testified, presumably during the deposition, that he had been involved in 200 altercations as a police officer, 50 of them knock-down-drag-out. It is therefore impossible for this court to determine with any degree of certainty how many altercations the victim admitted participating in as a police officer. Even if it were 200, however, absent evidence that he improperly

provoked or continued them or used excessive force during them, the evidence was not relevant. Defense counsel made no offer of proof in this regard.

Defense counsel represented to the trial court that the victim had been sued, along with other officers, in federal court, for using excessive force while working for the Coachella Police Department in 1997. The case was settled without a trial. The prosecutor said he did not know whether it was settled for “two cents and attorneys fees . . . or \$2 million.” He added, “[The victim] was not fighting the case. An attorney on behalf of the government was.” Belton here contends that the trial court abused its discretion by not allowing the victim to be questioned about this suit and settlement. We disagree. Unless the victim made relevant admissions during the litigation or as part of the settlement, it was not proof that he used excessive force on a prior occasion. Further, there was no offer of proof made that that incident was similar to this one.

2. Incompetency of Trial Counsel

In both his appeal and petition for writ of habeas corpus, Belton seeks reversal of his conviction and remand to allow him to bring a *Pitchess* motion, aimed at discovering excessive force complaints against him, his trial attorney having failed to do so below. In a declaration in support of the petition, trial counsel for Belton states, “I had no reason, tactical or otherwise, for failing to request discovery of police personnel files in this case.” The People, on the other hand, assert that defense counsel must be remembering incorrectly, because they interpret certain statements made by him during trial as suggesting that he had gotten the information he needed through another source and/or

had tactical reasons for not bringing a *Pitchess* motion. In the face of these contradictory claims, our only recourse is to order a show cause hearing at which trial counsel will explain why he failed to bring a *Pitchess* motion.² If, in fact, he had no tactical or other sound reason for failing to do so, the matter will be remanded so a *Pitchess* motion can be brought. (*People v. Hustead* (1999) 74 Cal.App.4th 410, 423; *People v. Gill* (1997) 60 Cal.App.4th 743, 751.)

DISPOSITION

A show cause hearing shall be conducted during which trial counsel for Belton will be required to explain why he failed to bring a *Pitchess* motion below. If the trial court determines that his failure was due to an informed tactical decision, within the range of reasonable competence, it shall reinstate the original judgment and sentence. If the trial court determines that his decision was not, it shall entertain a *Pitchess* motion brought by the defense. If discoverable information that could lead to admissible evidence helpful to Belton in defense of the charge is revealed during the in camera hearing pursuant to that motion, the trial court shall grant the requested discovery and

² We decline the People's invitation to make a credibility determination by choosing to interpret the record as they do and disbelieve the factual assertions made by trial counsel for Belton in his declaration. (See *People v. Duvall* (1995) 9 Cal.4th 464, 478.)

order a new trial.³ If such information is not revealed, the trial court shall reinstate the original judgment and sentence.

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RAMIREZ

P. J.

We concur:

McKINSTER

J.

RICHLI

J.

³ Of course, in granting a new trial, the trial court must first determine that the information was prejudicial to Belton.